Supreme Court, U.S.
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No. 92-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

JOSEPH SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, MONICA MIGLIARINO, VITAL-MED LABORATORIES, INC., PRO-LIFE, DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONSE OF RESPONDENT MONICA MIGLIARINO (MILLER) TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should review a decision of the Seventh Circuit Court of Appeals which upheld the dismissal of Petitioners' Second Amended Complaint in that Petitioners failed to adequately allege under the Sherman Act and RICO any overriding economic motive for the actions of the pro-life activist Respondents.

RULE 29.1 STATEMENT

Respondent Monica Migliarino is an individual, and has no parent or subsidiary companies. The Petitioners have accurately listed the parties to this proceeding.

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OPINIONS BELOW

The opinions below are adequately described in the Petition, however, the opinion of the Seventh Circuit Court of Appeals has been published at 968 F.2d 612.

STATEMENT OF JURISDICTION

The statement of jurisdiction is properly set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are properly set forth in the Petition for Certiorari.

STATEMENT OF THE CASE

Respondents take issue with Petitioners' STATEMENT OF THE CASE where it is stated that "the Complaint did not in any way implicate lawful speech or petitioning by persons opposed to abortions." (Petition for Certiorari, page 4).

As the Seventh Circuit Court of Appeals noted in the Appeal below, "Peaceful picketing, debate, meetings, prayers...are protected by the First Amendment." (Petition for Certiorari, App. A-6).

Respondent Monica Migliarino[1] was alleged to have "...threatened S.W.H.O.'s [Summit Women's Health Organization, Incorporated] future landlord and co-tenants" in a successful effort to block the move of S.W.H.O. abortion clinic to a new premises. (*Id.*, App. A-5).

Nevertheless, threats to merely continue social and political pressure by means of "picketing, debate, meetings, prayers..." clearly implicate the First Amendment. Plaintiffs' broadly drawn complaint does not exclude the implication that Respondent's "threats" were merely the expression of a commitment to continue protected First Amendment activity.

Petitioners' use of the terms "unlawful," "violent," (Id., page 3) "illegal," "tortious" and, perhaps most colorful of all,

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[1] Respondent Migliarino was married after being joined in this action, and her married name is Monica Miller. For purposes of continuity, she shall be referred to as "Migliarino."

"campaign of terrorism" (Id., page 4) and "campaign of criminal acts" (Id., page 5) belies the Petitioners' statement that, "This case is not about a women's right to abortion." Why else would Petitioners use such incendiary epithets for such benign conduct as offering burial rites for aborted babies? It would seem to be an obvious corollary that the more wrongful the Respondents' actions are made to appear, the more, thereby, Petitioners underscore the fact that the rights that the Respondents have allegedly denied are "women's reproductive rights," precisely those rights that the Plaintiff organization is "dedicated" to protect (Id., page 3). Petitioners' statements in this regard are self-serving at best.

Petitioners allege that "several [Respondents]...compete with Plaintiff clinics, and derive substantial income - in some cases hundreds of thousands of dollars a year - from their enterprises." (*Id.*, page 5). Yet Respondent Migliarino was never alleged to have derived any monetary benefits whatsoever for her pro-life activities.

SUMMARY OF ARGUMENT

The dismissal of the Plaintiffs' Second Amended Complaint was proper in that the Plaintiffs' Anti-trust Cause of Action under the Sherman Act failed adequately to allege a sufficient economic purpose on the part of the Respondents showing that the Respondents exerted market control, control of price or other discrimination between purchasers.

The Seventh Circuit decision did not exempt the Respondents because they were involved in a "social cause," but rather, because their motives were non-commercial in nature. Furthermore, the Seventh Circuit's decision adequately protected the First Amendment rights of social and moral activists from the reach of the Sherman Act.

The dismissal of the RICO counts was also proper and is in keeping with the holdings of the 2nd and 8th Circuits that the

actions of social and moral activists that are not primarily directed toward an economic goal do not fall under the proscription of RICO, and such a holding is further consistent with the intent and history of RICO and the definition of "enterprise" under RICO.

Further, the allegations by the Petitioners that the receipt of contributions by pro-life organizations and individuals satisfies the economic purpose requirement under RICO was properly rejected by the Seventh Circuit because of the lack of proximate causation between the receipt of contributions and the alleged wrongful activities of the Respondents.

Finally, the decision of the Seventh Circuit appropriately prevents the infringement of the First Amendment rights of pro-life protesters in that the severe remedies under RICO and the breadth of its reach would have a chilling effect on freedom of speech as well as freedom of association.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT RIGHTLY REQUIRED AN ECONOMIC PURPOSE AS A PRECONDITION FOR RICO LIABILITY

A. THE "CONFLICT" AMONG THE CIRCUITS ENVISIONED BY THE PETITIONERS IS ILLUSORY.

Petitioners argue that the Seventh Circuit Opinion in this case is "inconsistent with Opinions of the 2nd and 8th Circuits" (Id., page 7). Quite the contrary, the Seventh Circuit concluded that RICO liability requires economic motive, first and foremost, because the concept of "enterprise" included in both 18 U.S.C. §1962(a) and §1962(c) presupposes that "for purposes of RICO, an enterprise must be directed toward an economic goal" (*United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988)).

The Seventh Circuit adopted the reasoning of the 8th Circuit reflected in *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980) that an"enterprise"under RICO includes:

> Only an association having an ascertainable structure which exists for the purpose of maintaining operations *directed toward an economic goal* that has an existence that can be defined apart from the commission of the predicated acts constituting the pattern of racketeering activity.

(Petition for Certiorari, App. A-27)(Emphasis added).

Likewise, in the Second Circuit, the term "enterprise" in §§1962(a)and(b) conveys a limitation to economic (as opposed to political or social) entities (*United States v. Ivic*, 700 F.2d 51, 61 (2nd Cir. 1983). In *United States v. Bagaric*, 706 F.2d 42, 56 (2nd Cir.), cert. denied, 464 U.S.840 (1983) the Court affirmed the ruling in *Ivic* that the Plaintiff must show an overriding financial purpose, but such a purpose may be shown either through the "enterprise" or the commission of the predicate racketeering acts.

The Seventh Circuit's Opinion in this case is wholly consistent with the Second and Eighth Circuits[2]. It is, admittedly, in stark contrast to, and in direct contradiction with the holding in the Third Circuit (*Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1349-40 (3rd Cir. 1989).

However, *McMonagle* is scant authority for the Petitioners' position because the Third Circuit in that case determined that since no economic motive is necessary under the Hobbs Act, no economic motive was thereby required when the Hobbs Act is used as a predicate under RICO. Thus the 3rd Circuit avoided

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[2] The Seventh Circuit decision was recently followed in *Webster v. Operation Rescue*, Case No. 91 C 20138, 1992 U.S. Dist. LEXIS 15488 (W.D.ILL. Oct. 9, 1992) involving RICO claims by the owner of an abortion clinic against protesters.

the determination of whether economic purpose was required under the RICO statute itself in its definition of "enterprise."

The requirement of an overriding economic direction of the enterprise in a RICO case is consistent with the legislative history and intent of RICO, as indicated in the next Section.

B. THE SEVENTH CIRCUIT DECISION IS CONSISTENT WITH THE INTENT AND HISTORY OF RICO.

This Court has indicated that the "...primary purpose of RICO is to cope with the infiltration of legitimate businesses" by organized crime. (*United States v. Turkette*, 452 U.S. 576, 591 (1981).

The concept of an economic enterprise is central to the RICO scheme. The "...essence of the [RICO] violation is the commission of those acts in connection with the conduct of an enterprise." (*Sedima S.T.R.L. v. Imrex Co.. Inc.*, 452 U.S. 576, 591 (1985)).

The term "enterprise" certainly "refers to the sort of entity in which funds can be invested in a property interest of some sort acquired, and hence the sort of entity which one joins to make money." (*United States v. Ivic*, 700 F.2d 51, 60 (2nd Cir. 1983).

The Statement of Findings in the preface to the Organized Crime Control Act of 1970, 84 Stat. 922-23 quoted by this Court in *Turkette*, 452 U.S. at 588-89 refers to the fact that "...organized crime activities in the United States weaken the stability of the nation's economic system, harm innocent investors and competing organizations, interferes with free competition, seriously burden interstate and foreign commerce..."

RICO was enacted, in its final form, in an effort to mitigate the effects of organized crime which drains exorbitant sums of money from the economy through exploitive action (*Senate Comm. on the Judiciary. Organized Crime Control Act of 1969*,

S. REP. No. 617, 91 St Cong., 1st Sess. (Statement of Finding and Purpose) (1969)).

The arsenal of punitive weapons contained in RICO were designed to destroy the otherwise invulnerable economic base of organized crime (Califa, *RICO Threatens Civil Liberties*, 43 Vand. Law Rev. 805 (1990)).

RICO was never intended, and therefore should not be applied, for use against respondents motivated to oppose abortion where the economic impact of their pro-life activities is only incidental and is not part of an overall scheme "directed toward an economic goal..." (*Anderson*, 626 F.2d at 1372).

C. ALLEGATIONS RELATING TO RECEIPT OF CONTRIBUTIONS BY PROTEST ENTITIES OR RELATING TO INCIDENTAL ECONOMIC IMPACT OF PROTESTORS' ACTIONS DO NOT SATISFY THE ECONOMIC PURPOSE REQUIREMENT OF RICO.

In argument before the Seventh Circuit the Petitioners contended that the receipt of contributions by some of the Respondents as result of their alleged illegal activities satisfied the economic purpose requirement as a prerequisite to RICO liability.

The Petitioners again revisit that argument in their Petition for the Writ of Certiorari by arguing that the economic element under RICO is satisfied by allegations of substantial salaries by some of the Respondents (funded by contributions) and by the Respondents' purpose to drive abortion clinics out of business and thereby impacting the national economy. (Petition for Writ of Certiorari, pages 10-11).

Petitioners' argument, that the fact that some Respondents received the benefits of supporting contributions as a result of their activities constitutes a sufficient economic purpose, relates specifically to the language of 18 U.S.C.§1962(a) which

provides in part that, "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity...to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise...".

Before the Seventh Circuit, this Respondent argued that there must be a relationship of "proximate causation" between the receipt of contributions and the alleged racketeering activities. Respondent argued that:

> First, the Nexus between an alleged profit motive (presumably by virtue of gaining the benefit of increased public contributions) and the alleged wrongful acts themselves is too remote and abstract to constitute a sufficient economic motive under RICO. The element of "proximate causation", in other words, is missing. Plaintiffs apparently recognize that in the Seventh Circuit there is a necessity of pleading a causal link between wrongful acts and the income received ...

(Brief of Appellee Monica Migliarino (Miller), page 22)

The Seventh Circuit adopted the "proximate causation" rule (Petition for Writ of Certiorari, App. A-23, 24) noting that this Court has adopted the proximate cause approach to RICO previously in *Holmes v. Securities Investor Protection Corp.*, ___ U.S.__, 112 S.Ct. 1311, 1318 (1992).

The Seventh Circuit appropriately concluded that:

> Based in part upon notions of proximate cause, we believe this alleged relationship between the defendants' criminal acts and their supporters voluntary contributions is simply too tenuous to satisfy the requirement of §1962(a).

(Petition for Certiorari, App. A-24).

This Court has likewise applied the concept of proximate causation to protest activities, holding that "while the state legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered." (*N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982); (see also *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 730 (1966) where the Court held that the permissible scope of remedies in protest and demonstration cases involving union activity "is strictly confined to the direct consequences of such [violent] conduct and does not include consequences resulting from associated peaceful union picketing or other union activity.").

Because this Court has consistently applied the concepts of proximate causation to rationally limit the reach of state and federal regulation applied to political or social protest movements, and has previously applied those concepts to the provisions of RICO, the granting of Certiorari in this case is unwarranted and unnecessary.

D. REQUIREMENTS OF ECONOMIC PURPOSE UNDER RICO ARE NECESSARY TO CIRCUMSCRIBE AND PROTECT FIRST AMENDMENT RIGHTS.

The rights protected by the First Amendment are profoundly important in our society. Califa, *RICO Threatens Civil Liberties*, 43 Vand.L.Rev. 805, 832 (1990). Free speech is a transcendent value and the harm resulting from the chilling of free speech is comparatively greater than the chilling of other activity. *Id.* Applying RICO and the antitrust laws to anti-abortion demonstrators threatens their right to participate in an "uninhibited, robust, and wide open debate" on issues of public importance. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Clearly the abortion issue has not been settled either in

the law or in the public mind, and ensuring free and open public debate on the subject is a matter of public importance. Faglioni, *Balancing First Amendment Rights of Abortion Protesters With the Rights of Their 'Victims'*, 48 Wash. & Lee L. Rev. 347 (1991).

The use of RICO and antitrust causes of action against demonstrators has been criticized as setting a dangerous precedent that allows business and government to inhibit groups wishing to exercise their First Amendment rights. Moretti, *Using Civil RICO to Battle Anti-Abortion Violence: Is the Last Weapon in the Arsenal a Sword of Damocles?*, 25 New Eng.L.Rev. 1363 (1991).

By the very breadth and punitive power of its provisions, RICO holds the potential for massive Constitutional infringement. Its provisions have been described as both "powerful and expansive." *U.S. v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 23 (2nd Cir. 1989).

Referring to RICO, one scholar indicates that "the potential for litigation abuse in this area is manifest, and its impact could chill pro-abortion or anti-abortion demonstrations" (referring to *Northeast Women's Center. Inc. v. McMonagle, Supra*), Blakey and Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God-Is This* the End of RICO?", 43 Vand. Law Rev. 851, 975 (1990).

Scholars describe the types of cases that have been brought under RICO as weapons of political coercion, as having included claims:

> Against pro-life protestors to recover the costs incurred by the municipality to arrest protestors who participated in sit-ins at Brookline, Massachusetts abortion clinics...alleging RICO violation based on allegation that picketing and sporadic blocking of

> doors, without any entry into clinic, constituted Hobbs Act extortion...alleging violation of RICO as a result of defendants' alleged conspiracy to steal the bodies of aborted babies from garbage disposals in the Chicago area and transport them across state lines for burial...sued by owner of building that leases space to abortion clinic alleging RICO violation based upon allegation that picketing and sporadic blocking of doors, without entry into clinic, constitutes Hobbs Act extortion [citations omitted]...those intimately involved in this litigation, at least on the defendants' side, are virtually unanimous in their expression of belief and frustration that the Federal Courts are being used to suppress anti-abortion demonstrators contrary to the First Amendment and the unequivocal teaching of *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)...the principal purpose and calculated effect of these litigation tactics are to chill the exercise of Constitutional rights in the anti-abortion movement.

(*Id.* at 976).

The unparalleled breadth of RICO has already been criticized by one former Justice who indicated that:

> The Court's interpretation of [the scope] of the civil RICO statute quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of frauds...

(*Sedima S.T.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 501 (1985))(Marshall, J. dissenting).

Justice Marshall also wrote: "[C]ivil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." *Id.* at 506.

When we consider that "[RICO] is precisely designed to ruin those individuals and enterprises it is aimed at" through its punitive and expansive penalty provisions (*Ralston v. Kapper*, 569 F.Supp. 1575, 1580 (E.D.Mich 1983)) we must ensure that those targets of its powerful provisions are not pro-life protestors seeking a peaceful and nonviolent end to abortions.

Sometimes, nonviolent Constitutionally protected behavior is found in a milieu with non-protected activity. It is in exactly this situation that this Court has warned that"precision of regulation"is demanded. *N.A.A.C.P. v. Claiborne Hardware*, 458 U.S. 886, 916 (1982) *citing N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963).

The Court has recognized that there is a special danger to free speech when statutes are not finely drawn, and the line between lawful and unlawful speech is unclear, *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958), or when the standards for litigation are based on"shi ing sands". *Id.*

In applying the "precision of regulation" concept to the politically-motivated boycotts in *Claiborne*, which were conducted for the purposes of securing racial equality, this Court commented, with regard to the argument that speech which in some way attempts to effect or cause an economic harm should not be entitled to First Amendment protection, that"'[F]ree trade in ideas' means free trade in the opportunity to persuade to action not merely to describe facts."*Id.* at 910.

A high standard of precision is required in cases which involve a large number of citizens engaged in a wide variety of behavior so as to avoid the dangerous risk of chilling First Amendment rights. Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U.L. Rev. 685 (1978).

Precision in interpreting the provisions of RICO is necessary also to preserve freedoms of association under the First

Amendment, in as much as vicarious liability among activists would violate First Amendment rights if imposed in the context of group political action. The problem with "applying the standard rules of vicarious liability to organizations formed to achieve political goals...can be found in the Court's observation that citizens will be deterred from joining political organizations if they can be easily held jointly and severally liable for the unlawful acts of overexuberant comrades." Note, *Supreme Court, 1981 Term*, 96 Harv. L. Rev. 62 (1982).

Given the economic realities of almost all social and political action aimed at perceived social or moral evils (including abortion) almost all protest organizations have some economic component or cause some economic impact through their activities. Plaintiffs' expansive interpretation of RICO, if it prevails, will have a devastating and chilling effect on the future of robust and vigorous debate, political association, and peaceful protest activity regarding abortion. This Court must prevent a scenario, which would be played out under Petitioners' theory of law, whereby the Federal Judiciary will become a weapon of political advantage used by disgruntled pro-abortion interest groups against pro-life protestors of conscience.

II. THE SHERMAN ANTITRUST ACT DOES NOT APPLY TO THE ACTIONS OF THE RESPONDENTS

A. THE SEVENTH CIRCUIT DID NOT EXEMPT THE RESPONDENTS FROM THE SHERMAN ACT BECAUSE OF "GOOD MOTIVES," BUT RATHER BECAUSE OF NON-ECONOMIC MOTIVES.

Petitioners argue that the Seventh Circuit has erected a subjective test for exemption from the Sherman Act based on "what is socially desirable". Petition for Writ of Certiorari, page 13. However, Petitioners misstate the fundamental holding in the Seventh Circuit Decision in this matter.

The Seventh Circuit did not exempt the Respondents because of their "good motives" (one need only remember the closing remarks of the Seventh Circuit opinion in which they denominate the actions of the Respondents as "reprehensible") but rather, found that the Respondents' activities did not fit within the Sherman scheme because the intrinsic nature of the actions themselves were non-economically related ("...but the Respondents' acts are far beyond those that Congress intended to reach with the Sherman Act."). Petition for Writ of Certiorari, App. A-17.

The Sherman Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress..." *Northern Pacific Railroad v. United States*, 356 U.S. 1, 4-5 (1958).

Petitioners have wrenched the Sherman Act from its market and commercial underpinnings in an attempt to wield it as an all -purpose Damocles sword against pro-life protesters of conscience solely on the basis that their actions have economic consequences.

The Respondents in this case do not seek, for their own financial benefit or economic advantage, to preempt or usurp any portion of the health care industry and certainly not the abortion industry.

Far from basing its decision on the social utility of the Respondents' "good motives," in actuality, the Seventh Circuit decision rested its reasoning squarely on *Apex Hosiery Company v. Leader*, 310 U.S. 469 (1939). Despite the "reprehensible" conduct of the Respondents in the *Apex Hosiery* where union members forcibly took over a factory, remaining in possession for more than a month and changed locks, damaged equipment and other property, this Court concluded that there was no violation of the Sherman Act.

The Seventh Circuit Decision relied on the reasoning of *Apex Hosiery* that the Sherman Act was not designed "...to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect of any form of market control of a commodity, such as to monopolize the supply, control, its price, or discriminate between its would-be buyers." 310 U.S. at 511.

Petitioners, however, conveniently omit any reference to the *Apex Hosiery* case in their Petition for Certiorari.

Further, Petitioners reference to Professor Bork's antitrust theories in *The Antitrust Paradox* (1978) is curious (Petition for Writ of Certiorari, p. 16). Petitioners contend that Professor Bork's position that "our free market economy is based on the premise that consumers will define their own welfare" supports their interpretation of the Sherman Act. Quite the contrary, Professor Bork himself cites his work *The Antitrust Paradox* (1978) as authority for the proposition that, under the leadership of Chief Justice Warren,"antitrust law was made into an intellectual shambles as the court ruled against almost every business defendant, no matter what the precedent, the economic reality, or the lower court's finding of fact."Bork, *The Tempting of America: The Political Seduction of the Law*, p. 73 (1990).

Professor Bork's work is a strange citation of authority for Plaintiffs' even stranger interpretation of the Sherman Act in this case, particularly because he has studiously criticized the politicalization of the legal system and the use of law as a political weapon. *Id.* at 349.

Petitioners rely extensively on *Counsel of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920). However, Petitioners' reliance is fatally flawed.

While it is true that the Seventh Circuit Decision characterized *Counsel of Defense* as "no longer good law" (Petition for

Writ of Certiorari, App. A-19), nevertheless, *Counsel of Defense*, on closer scrutiny, can be easily distinguished from the case before the Court.

As the Eighth Circuit itself indicated in *Missouri v. National Organization of Women*, 620 F.2d 1301, 1304 n.4 (8th Cir.), cert. denied, 449 U.S. 842 (1980):

> The economic coercion of the boycott [in the N.O.W. case] was designed to procure affirmative action by the Missouri Legislature. In *Counsel of Defense* there was economic punishment for past actions; in the instant case there is economic injury to achieve immediate or future action.

Similar to the facts in *Missouri v. National Organization of Women*, and unlike the *Counsel of Defense* case, the Respondents in this action created "economic injury to achieve immediate or future action."

This Court reasoned in *FTC v. Superior Court Trial Lawyers' Association*, 493 U.S. 411, 426 (1990) that the fact that boycotters or other protestors "sought no special advantage for themselves" (referring to the boycott in *N.A.A.C.P. v. Claiborne Hardware*, 458 U.S. 886 (1982) is a distinction in a "decisive respect," distancing such boycotters and other demonstrators from decisions where the conduct in question comes within the purview of the Sherman Act.

In summary, the Plaintiffs have alleged "activity distinct from the sphere of commerce" and have failed to allege, let alone prove, that the Respondents have any form of "market control," within the context of the Sherman Act. As Justice Louis Powell stated:

> Competitive economies have social and political as well as economic advantages...but an antitrust policy divorced from market considerations would lack any objective bench mark.

(*Continental T.V.. Inc. v. GTE Sylvania. Inc.*, 433 U.S. 36 (1977)).

Petitioners' theory of the Sherman Act would create a body of antitrust law that would be used indiscriminately against social and moral protesters of all stripes and persuasions, but which would lack any objective bench mark of interpretation, resulting in legal absurdities bounded only by the imagination of plaintiff litigants.

B. THE SEVENTH CIRCUIT DECISION PROTECTS FIRST AMENDMENT RIGHTS.

The likely result of the Petitioners' legal theory, if allowed to succeed, would be to "grossly over-deter" borderline free speech activity. PoKempner, *The Scope of Noerr Immunity for Direct Action Protesters: Antitrust Beats the Anti-Abortionists*, 89 Colum. L.Rev. 662, 696 (1989).

The jurisprudential walls that protect First Amendment rights must necessarily be high and relatively impenetrable if we are to give freedoms of expression the "breathing space that they need to survive." *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964).

Overly-broad interpretations of the Sherman Act will likely chill the participation of activist sympathizers who fear that their mere association with activist organizations may result in substantial liability for antitrust damages.

This Court has previously stated, relative to the Sherman Act, that:

> No violation of the Act can be predicated upon mere attempts to influence the passage or *enforcement* of laws.

(*Eastern Railroad Presidents' Conference v. Noerr Motor Freight Company. Inc.*, 365 U.S. 127, 135 (1961)(emphasis added).

While the Seventh Circuit criticized the *alleged* actions of the Respondents in this case, even placing the alleged activities of the Respondents in the light most favorable to the Petitioner, the acts of trespassing and disorderly conduct at abortion clinics can be accurately characterized as a "mere attempt to influence the...*enforcement* of laws" relating to the right of women to have abortions.

We believe there are striking similarities between the alleged activities of the Respondents in this case and the sometimes violent boycotts in *N.A.A.C.P. v. Claiborne Hardware* (Supra). Where a particular political or social campaign is "not intended to destroy legitimate competition," the Sherman Act has no application. *Claiborne Hardware*, 458 U.S. at 914.

As was the case in *Claiborne Hardware*, we must avoid a construction of the Sherman Act which would result in a "complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." *Claiborne Hardware Co.*, 458 U.S. at 914.

Because statutes that touch on First Amendment activities must be narrowly interpreted and narrowly drawn to address only the specific evil at hand (*Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973), and because Petitioners' interpretation of the Sherman Act goes far beyond addressing the specific evils for which the Sherman Act was designed and places an unconscionable and unconstitutional strangle hold on the free speech and free association rights of present and future pro-life activists, it must be unilaterally rejected and this Petition should be denied.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals should be denied.

Respectfully submitted,

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